

STAT

How Uncle Sam Covers the Mails

Bruce A. Lehman and Timothy A. Boggs

Early in 1973, a 16-year-old New Jersey school girl named Lori Paton wrote to the Socialist Worker's Party in New York City asking for information about that organization for a class project. Several months later, much to the Paton family's surprise, an agent of the Federal Bureau of Investigation began asking questions about them. A local credit bureau was asked for financial data concerning Mr. Paton. Police files were gone through. The agent visited the local high school to interrogate the principal and several teachers about Lori Paton. Eventually, the case caused a stir in the national press and the United States Congress—all because what should have been an ordinary exercise in a high school civics class fell victim to a little known form of surveillance called a mail cover.

A mail cover is an investigative tech-

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20 • Illustrations by Hai Knafo

nique in which, at the request of a law enforcement agency, the Postal Inspection Service—the law enforcement arm of the U.S. Postal Service—records all information appearing on the outside of first class mail received by the subject of the cover. This includes the names and addresses of senders, the dates and places of postmarkings, and, occasionally, information such as the weight of the mail. Individual letter carriers may not even be aware that a mail cover is in operation.

Each year thousands of Americans are put under surveillance through mail covers at the routine request of city, state, and federal law enforcement agencies, including those agencies concerned with "national security". While mail covers are often used for perfectly valid reasons such as tracing a fugitive, outrages like the Lori Paton case occur because the Postal Service is subject only to its own self-regulation in establishing the surveillance. The Post Office admits it has been unable to develop guidelines to accurately assess the validity of law enforcement requests for the use of mail covers. The Courts, meanwhile, have rejected arguments that the

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practice is a violation of Fourth Amendment rights against unreasonable search and seizure, while Congress has been unwilling to enact legislative proposals to either ban the mail cover technique or to reform it.

The adequacy of self-regulation by government agencies whose activities may pose a threat to the privacy of the public is at the root of the mail cover issue. Certainly, the recent furor over the intelligence-gathering activities of the CIA and FBI demonstrates the basic inadequacy of government agencies operating within their broad statutory charters by what amount to self-regulatory methods. The staff of the Center for National Security Studies recently denounced the practice of self-regulation, especially by the intelligence agencies, by saying, "patching a few regulations on the same old activities and restraining threadbare exhortations cannot be called reform—these cannot protect civil liberties."

Support for self-regulation has come from some powerful sources, however. Testifying before Sen. Sam Ervin's Sub-

committee on Constitutional Rights in 1971, then Assistant Attorney General William Rehnquist said: "I think it quite likely that self-discipline on the part of the executive branch will provide an answer to virtually all of the legitimate complaints against excesses of information gathering." But a brief history of how mail covers have been used, especially after they began to be instituted in connection with "national security," will demonstrate the woeful inadequacy of the Rehnquist argument.

The first official mention of law enforcement access to the information appearing on the outside cover of first class mail is found in the Postal Regulations of 1879. They advised postmasters that postmarks and addresses on letters were confidential, except to the addressee and "authorized authorities," including "officers of the law, to aid them in discovering a fugitive from justice." The 1893 Postal Regulations reinforced this modified expectation of privacy of the mails, and in a rare example

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of regulatory lucidity explained that it is one of the Postal Inspection Service's duties to assist law enforcement agents in discouraging "fraudulent schemers and swindlers" who utilize the mails. This mixed view of privacy of the mails qualified by a concern for law enforcement has continued throughout subsequent modernizations of the postal regulations.

Until the 1940s, postal information was available only to postal inspectors and officers of the law. Access to the mails was considerably expanded in 1948, however, by a new regulation entitled, "Exception for Official Request," which permitted mail covers to be placed at the request of a representative of any executive department, agency, or independent establishment of the federal government. Ironically, this broader use of mail covers first brought the abuse of the technique to national attention when a mail cover was instituted against Sen. Joseph McCarthy by a Congressional investigating committee.

The junior Senator from Wisconsin was investigated by the Senate Subcommittee on Privileges and Immunities in 1952. It was alleged that McCarthy had used Senate funds to speculate on the stock market, and a mail cover was placed on him to determine the name and address of his stock broker. Two years later, during the McCarthy censure debates, the existence of this mail cover was revealed. Many senators felt that the mail cover was an unwarranted invasion of McCarthy's privacy, and an immediate investigation of the cover itself was ordered by the Senate.

22 A special investigating committee discovered that the counsel of the 1952 Sub-

committee had literally rubber-stamped Chairman Thomas C. Hennings' signature to a mail cover request. The Post Office Department, ever aiming to please Capitol Hill, watched and reported on the mail of McCarthy and three of his staff at Washington and Maryland addresses. In its final report, the special investigating committee did not question the use of mail covers as it was generally practiced, but condemned the technique as a questionable tactic for Senate investigators. The Post Office Department rewrote its mail cover regulations in 1954, partly in response to the uproar over the McCarthy incident. The new regulations returned to the old provision that postal information was to be made available only to postal inspectors and officers of the law seeking fugitives from justice.

National interest in mail covers wasn't renewed until 1965 when a series of Congressional hearings titled "Invasions of Privacy by Government Agencies" were conducted by Sen. Edward Long. The Long Committee stumbled upon the problem of mail covers while investigating unrelated complaints made to it by postal workers. Its subsequent scrutiny of the technique generated pressure both in Congress and the press to eliminate mail covers entirely. The *Washington Post*, summing up opinion about the practice, editorialized: "Like the proverbial village postmistress who, according to legend, used to hold everybody's mail up to the light and scrutinize every envelope to find out who was writing to the neighbors, the

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U.S. Post Office Department now seems to have embraced snooping as a universal policy."

The Postal Service instituted new regulations controlling the use of mail covers following the Long Hearings. These regulations, still in force today:

- allowed mail covers to be used for national security purposes, locating a fugitive or obtaining evidence of the commission or the attempted commission of a felony.
- authorized the use of mail covers by over 70 Postal Inspection Service employees at the request of an array of federal, state, and local law enforcement personnel.
- prohibited mail cover use on lawyer-client mail and on the mail of persons under indictment.
- placed time limits on mail covers.
- required that a record be kept on the authorizations of mail covers.

Senator Long was apparently pleased with the new regulations. He wrote in a

St. Louis law review article that due to "new and more rigid controls [which] have been issued, indiscriminate use of mail covers that invade normally confidential relationships have been curbed."

An example of how most people thought mail covers were being utilized following the Long Hearings was given in testimony before the House Judiciary Subcommittee on Civil Liberties in 1975. Then Chief Postal Inspector William J. Cotter told of the following incident:

About two years ago, there was an advertisement in the TV Guide: "Participate in a Contest! and, if you win, you will get a free holiday to Acapulco, something like that. Send in this card." So a lot of people sent in the card, and as a consequence—oh, there were many winners. Everybody won, in fact. "You have won and you will be going on this trip to Acapulco; however, you have to send in \$25, which will be reimbursed to you at the time you depart." Fortunately, two of the winners were neighbors. They invited it to the attention of a postal inspector because they thought there was something wrong. We moved in on that case, and it was obvious to us that there was something going on. We

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Cotter testified that there were no standards for national security mail covers whatsoever.

put a mail cover on the fellows [who had sent out the "winner" notices] to see the extent of their mail. And then we contacted some additional people and found that everybody was a winner. We went to our administrative law judge and had a hearing under section 3005 of Title 39, USC [relating to false representations] and the administrative law judge agreed to halt delivery of the mail. Prior to that proceeding, we had gone into court and had obtained a temporary restraining order under section 3007. As a consequence of that mail cover and the prompt action taken, we saved the customers, the American people, perhaps \$150,000 very, very quickly.

Mr. Cotter subsequently retired amidst Congressional criticism of his role in the CIA mail opening program. What he did not so proudly tell the House Subcommittee was that the Postal Inspection Service had cooperated for years with the FBI and CIA by placing mail covers on the mail of thousands of Americans who have correspondents in the Soviet Union and other communist nations as well as on the mail of the Socialist Workers Party. In fact, Cotter testified that the much-condemned CIA mail openings were often preceded by mail covers.

These revelations and others about mail covers were brought to light by the House Judiciary Subcommittee on Civil Liberties, chaired by Rep. Robert Kastenmeier of Wisconsin, which began a review of a number of surveillance techniques two years ago. Sparked by the testimony of ACLU lawyers John Shattuck and Leon Freidman, the Kastenmeier Subcommittee requested the Postal Service to assemble an analysis of the use of mail covers for the years 1973 and 1974; a list of the number of mail covers initiated each

month categorized by requesting agency with average duration noted; and a list of the postal officials who had the power to authorize a mail cover.

This analysis revealed that over 35 separate agencies—local, state, and federal—had requested and were granted over 4000 mail covers in both 1973 and 1974. These figures are not by themselves a condemnation of the mail cover practice, but further questioning of postal authorities revealed, at the very least, a tremendous potential for abuse. Mail covers had been granted to such diverse agencies as a fish and wildlife commission, a state real estate commission, the Internal Revenue Service, virtually all the intelligence agencies from the FBI and the CIA to the Air Force Office of Special Investigations, and, on two occasions, the Royal Canadian Mounted Police.

The Kastenmeier Subcommittee pressed the Postal Service to describe what standards, if any, they apply to such agency requests for mail covers. Must the requesting agencies show that the mail cover is part of an ongoing criminal investigation, or that the mails are being used as the instrument of the alleged crime? Did the Postal Service put any limits on mail cover requests? Or could an agency receive a mail cover for the innocuous reason of simply wanting to know who was writing to the Socialist Workers Party, as the FBI had done in the Lori Paton case?

When questioned about standards in the application of national security mail covers by Rep. Robert Drinan, Chief Postal Inspector Cotter was virtually at a loss for words:

Cotter: I would welcome guidance of some

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sort as to what standards I should use in making my judgment with regard to a national security mail cover.

Drinan: Apparently you have no standards.

Cotter: There are no standards.

Drinan: No standards whatsoever?

Cotter: No sir.

Given the fact that the Postal Service doesn't maintain standards for the institution of national security mail covers—and by its own admission is looking for guidelines—can we expect these to come from the Courts or from an ever reluctant Congress? Many civil libertarians may feel that the Courts will mandate these necessary protections of postal privacy, much as they've already done in the areas of wiretapping and electronic surveillance. However, the prevailing judicial position is that modern postal practices have made satisfactory progress in the area of privacy.

The Supreme Court's classic statement on the privacy of the mails was enumerated in the landmark case of *Ex Parte Jack-*

son, in 1877, where Mr. Justice Field, writing for the Court, held:

Letters and sealed packages . . . in the mail are as fully guarded from communication and inspection except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles . . . No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail, and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution.

This doctrine was reinforced by Mr. Justice Harlan in 1957 when he expressed satisfaction with Post Office practices by noting that "the hoary dogma . . . that the use of the mails is a privilege on which the government may impose such conditions as it chooses, has long . . . evaporated."

The Courts, nonetheless, have proved unwilling to protect the outside of an envelope. The use of mail covers has continued unabated by judicial scrutiny or legislative restraint largely because of the view

that information appearing on the outside of sealed letters and packages enjoys no expectation of privacy. As a result, critics of mail covers have been unsuccessful in attempting to convince the courts to extend Fourth Amendment privacy protections to their use.

Mail covers have been attacked on other grounds, though also without success. In *United States v. Costello*, it was argued that, quite apart from constitutional considerations, the use of mail covers was illegal under those provisions of the Federal Criminal Code which make it a crime to tamper with the mails. The Court of Appeals which heard the case was unimpressed. The Court simply responded that, "nothing more was done than to record the information carried on envelopes . . . this does not come within the prohibition against 'taking' a letter or prying into another's secrets or business."

Nevertheless, there have been few legal attacks on the mail cover technique over the years, and it is possible that, given the right facts and an innovative legal theory, the courts may change their view. The Second Circuit Court of Appeals recently hinted at the possibility of such a change in the case of *United States v. Leonard* when it observed:

It may well be that in these days of increased concern for the protection of privacy . . . [the law should not be read as permitting] . . . the Government, for example, to copy the outside of every envelope received by every citizen.

The *Leonard* case involved a complex tax fraud scheme in which the defendants were using secret Swiss bank accounts to elude detection. The IRS placed mail covers on all air mail envelopes entering the United States from Switzerland in an ef-

fort to discover who was evading the tax law in this manner. The unattractiveness of these tax evaders coupled with the foreign origin of the covered mail did not present the best case to demonstrate that the government had overstepped its authority in conducting the mail cover. The Court held, "even if we assume that copying the outside of letters may, in some instances, be a 'search,' the facts of [the mail cover] improvised by the IRS did not involve an unreasonable one."

In addition to the paucity of legal challenges to mail covers, what may possibly be the most persuasive argument against their use has never seriously been advanced: that systematic government record keeping about the identity of one's correspondents has a chilling effect on freedom of expression in violation of the First Amendment. Such First Amendment considerations in the case of *Lamont v. Postmaster General* resulted in the Supreme Court's striking down a 1962 law which required that "communist political propaganda" published in foreign countries was to be detained by the customs service until the addressee notified the Post Office in writing of his desire to receive the mail. Lists of these recipients were then maintained by the FBI. In striking down the act, the Court found that the requirement was likely to inhibit "the robust, wide open debate and discussion contemplated by the First Amendment", especially by those who would be injured by an FBI listing such as government workers. A major obstacle to using the First Amendment argument in mail cover cases, however, is the difficulty of demonstrating specific damages so as to obtain standing to sue.

Quite clearly, the guidelines the Postal Service is seeking to regulate mail covers are not likely to come from the Courts. This is especially true when one considers

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that even if the Courts were to entertain a First or Fourth Amendment argument against the use of mail covers, it is exceedingly difficult for those whose mail has been improperly covered to find out about it in order to bring a court challenge. Of course it is now possible to find out in *some* cases if one's mail has been covered by filing a request with the Postal Service under the Freedom of Information Act. But when a mail cover has been requested by another agency, such as the FBI, the Postal Service will usually seek guidance from that agency in determining whether to comply with the FOIA request. And since national security mail covers are the most sensitive and potentially abusive, it can be expected that the Bureau will deny those requests.

Action will have to come from Congress if mail covers are to be regulated to prevent abuse. The leader in the drive to act has been Rep. Kastenmeier, whose Subcommittee on Civil Liberties held hearings on the mail cover problem in 1975. After listening to testimony, the Kastenmeier Subcommittee was critical of national security mail covers along with the general lack of statutory regulation of all mail covers, the wide array of agencies which may request them, and the large number of postal officers who may authorize them. Said Kastenmeier, "the official policy of the Postal Service, as set forth in its published regulations, is that first class mail is given absolute secrecy while in the custody of the Service. However, a number of disturbing facts have come to light

recently which bring into question the U.S. Postal Service's dedication to the confidentiality of the mail." Kastenmeier concluded his remarks by saying that the Congress must see to it that "today's postal patron may freely exercise his or her right to use the mails without the chilling fear of an unseen inquisitor intruding into the privacy of his communications."

In April 1976, the Kastenmeier Subcommittee favorably reported H.R. 214, The Bill of Rights Procedures Act. Title II of this legislation provided the first statutory regulation of mail covers ever to be seriously considered by either house of Congress. The committee found that the answer to the mail cover issue was not to eliminate them entirely, but rather to expunge their potential for abuse by establishing standards and rules of procedure. The bill provided that:

- A mail cover may be permitted only with the written authorization of the Chief Postal Inspector, a regional Chief Postal Inspector, and the Inspector-In-Charge or the U.S. Attorney General. A mail cover would be permitted only if one of these officials has good cause to believe that the mail cover is necessary to an ongoing felony investigation, and then only if a written request has been received from the chief officer of an agency of a federal, state, or local agency whose primary function is to investigate felonies.
- No mail cover would be permitted for more than 30 days without reauthorization.
- For continuance of more than one year, the mail cover would have to be approved by a United States District Court judge

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after a finding that termination of the cover would seriously jeopardize a continuing criminal investigation.

- All persons whose mail is subject to a mail cover would receive notice following termination of the cover, except when the court finds that such notice would seriously jeopardize a continuing criminal investigation.
- Any postal patron may seek injunctive relief in situations where he believes his rights are being violated.

When H.R. 214 was reported out to the full Judiciary Committee last year, it received the vigorous opposition of the Justice Department, although the Department's displeasure was aimed at sections of the bill other than Title II. Largely because of this opposition, the entire bill was referred back to the Subcommittee. The

Kastenmeier Bill has been reintroduced in the 95th Congress, and the Judiciary Subcommittee on Civil Liberties is expected to reconsider it this year.

It is unlikely that the new Attorney General, Griffin Bell, will react as adversely to a civil liberties proposal from a Democratic Congress as did his predecessor, Edward Levi. Still, we can expect that general opposition to increased controls on investigative techniques from the law enforcement and intelligence community will pose a formidable obstacle. But if a differentiation between mail cover abuses, such as the Lori Paton case, and legitimate uses, like tracing a felon, are to be made clear, this bill or similar legislation is a necessity. As Oliver Wendell Holmes once said, "The United States may give up the Post Office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues." ●

